SHAAFIE SAIBI

v.

PP

COURT OF APPEAL, PUTRAJAYA
ZAKI TUN AZMI PCA
JAMES FOONG JCA
KN SEGARA JCA
[CRIMINAL APPEAL NO: B-09-51-2007]
23 JANUARY 2009

CRIMINAL PROCEDURE: *Charge - Defective charge - Charges implying continuous offences of rape - Charges overlapping with each other - Charges preventing accused from raising an alibi - Whether charges defective*

CRIMINAL PROCEDURE: *Charge - Defective charge - Two charges preferred for two distinct offences - Charges not falling under ss. 165(1) and 164 of the CPC - Both charges jointly tried in a single trial - Whether trial null and void*

The appellant was charged in the Sessions Court on two charges of rape. The victim in both charges was the daughter of the appellant. The location where the offences were committed was also the same in both the charges. The first charge referred to an offence of rape committed in October 1992, without specifying any date or period in October 1992. The second charge referred to a rape between 1992 and 1995. The Sessions Court judge tried both charges jointly in a single trial, convicted the appellant on both charges and sentenced him to 20 years' imprisonment on each charge on consecutive terms. On appeal, the High Court maintained the convictions but ordered the terms of imprisonment to run concurrently. The appellant appealed to the Court of Appeal.

Held (allowing the appeal and setting aside the conviction and sentence on both charges)
Per KN Segara JCA delivering the judgment of the court:

(1) Rape is not a continuing offence but a single act of unlawful sexual intercourse. An offence of rape cannot be committed from 1 October 1992 to 31 October 1992, as alluded to in the 1st charge, nor can such an offence be committed

between 1 January 1992 till 31 December 1995, as stated in the 2nd charge. In the instant case, the offence in the 1st charge clearly overlapped the offence in the 2nd charge. When a charge prejudices the accused to a fair trial by not allowing him to legitimately raise a defence of alibi that charge must be deemed defective. (para 3)

(2) In the instant case, the two alleged offences by the appellant were distinct offences. Two distinct charges were correctly preferred as required by law. However, this was not a case in which the two charges could be tried together in one trial as sanctioned by law. The two charges did not fall within s. 165(1) of the CPC. The charges also did not fall within s. 164 CPC because the two alleged offences were not committed within the space of 12 months. The appellant ought to have been tried separately on the two charges, the failure of which resulted in an illegality. The trial of the appellant in the sessions' court was thus null and void. (paras 8, 9, 10, 11 & 12)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh di Mahkamah Sesyen atas dua pertuduhan rogol. Mangsa dalam kedua-dua pertuduhan adalah anak perempuan perayu sendiri. Tempat di mana kesalahan dilakukan juga sama dalam kedua-dua pertuduhan. Pertuduhan pertama merujuk kepada kesalahan rogol yang dilakukan pada bulan Oktober 1992 tanpa menyatakan tarikh atau tempoh di bulan tersebut. Pertuduhan kedua merujuk kepada kejadian rogol di antara 1992 dan 1995. Hakim Mahkamah Sesyen telah membicarakan kedua-dua pertuduhan secara bersesama dalam satu perbicaraan, dan kemudian mensabitkan perayu atas kedua-dua pertuduhan dan menjatuhkan hukuman 20 tahun penjara bagi setiap pertuduhan dengan hukuman berjalan secara berasingan. Di rayuan, Mahkamah Tinggi mengesahkan sabitan tetapi memerintahkan hukuman pemenjaraan berjalan serentak. Perayu telah merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan dan mengenepikan sabitan dan hukuman atas kedua-dua pertuduhan)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Kesalahan rogol bukan satu kesalahan berterusan tetapi adalah satu kesalahan tunggal melakukan hubungan jenis yang menyalahi undang-undang. Maka itu kesalahan rogol tidak

boleh dilakukan di antara 1 Oktober 1992 hingga 31 Oktober 1992, seperti yang dinyatakan dalam pertuduhan pertama, dan begitu juga ia tidak boleh dilakukan di antara 1 Januari 1992 hingga 31 Disember 1995, seperti yang tercatit dalam pertuduhan kedua. Dalam kes semasa, kesalahan dalam pertuduhan pertama jelas bertindan dengan kesalahan dalam pertuduhan kedua. Apabila sesuatu pertuduhan memprejudiskan tertuduh kepada perbicaraan yang adil dengan tidak membenarkannya membangkitkan satu pembelaan alibi yang sah, maka pertuduhan hendaklah dianggap sebagai cacat.

(2) Dalam kes semasa, kedua-dua kesalahan yang didakwa terhadap perayu adalah dua kesalahan yang berasingan. Maka dua pertuduhan yang berasingan telah dengan betulnya diajukan kepada perayu. Namun begitu, ini bukanlah kes di mana kedua-dua pertuduhan boleh dibicarakan bersesama dalam satu perbicaraan seperti yang dibenarkan oleh undang-undang. Kedua-dua pertuduhan tidak terangkum ke dalam s. 165(1) KPJ. Pertuduhan-pertuduhan juga tidak dirangkumi oleh s. 164 KPJ kerana kedua-dua kesalahan tidak dilakukan di dalam tempoh 12 bulan. Perayu seharusnya dibicarakan secara berasingan atas kedua-dua pertuduhan tersebut, dan kegagalan berbuat demikian adalah satu illegality. Maka perbicaraan perayu di Mahkamah Sesyen adalah tak sah dan batal.

Legislation referred to:
Criminal Procedure Code, ss. 163, 164, 165(1), 170
Penal Code, s. 376

For the appellant - Karpal Singh (Ramkarpal Singh with him); M/s Karpal Singh & Co
For the respondent - Mangaiarkarasi Krishnan DPP

Reported by Andrew Christopher Simon

JUDGMENT

KN Segara JCA:

[1] The appellant was convicted by the Sessions Court, Ampang, on two charges preferred against him under s. 376 Penal Code and sentenced to 20 years imprisonment to run consecutively for both charges. The High Court, Shah Alam, dismissed the

A appellant's appeal against conviction but allowed the appeal against sentence and ordered the sentence of 20 years imprisonment to run concurrently instead. This is the appellant's appeal against the decision of the High Court.

B **[2]** There are two main grounds of appeal. The first ground of appeal is that the learned trial judge failed to order the two charges to be heard separately and, the second ground is the vagueness of the particulars of the charges against the appellant with regard to the times in which he was alleged to have C committed them.

[3] The two charges preferred against the appellant are each in respect of rape under the same section of the Penal Code. The victim in respect of each charge is the same, that is, the D appellant's daughter (SP1). The location where the offences were perpetrated is also the same. The only difference between the two charges is the time of commission of the offences. The first charge is in respect of an offence in October 1992 (without specifying any date or period in October) and the second charge to an E offence between 1992 and 1995. At the very outset we wish to observe that rape is not a continuing offence but a single act of unlawful sexual intercourse. An offence of rape cannot be committed from 1 October 1992 to 31 October 1992, as alluded to in the 1st charge, nor can such an offence be committed F between 1 January 1992 till 31 December 1995, as stated in the 2nd charge, with the offence in the 1st charge patently overlapping in the 2nd charge. When a charge prejudices the accused to a fair trial by not being able to legitimately raise a defence of alibi that charge must be deemed defective.

G **[4]** At the outset of the appeal, the learned DPP conceded that the second charge was too vague in that the time of the alleged commission of the offence was over three years.

[5] Section 163 Criminal Procedure Code (CPC) provides that H for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately, except in the cases mentioned in ss. 164, 165, 166 and 170 CPC. That is a general mandatory provision which is only subject to the exceptions that are mentioned.

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[6] The first of these exceptions is contained in s. 164, which provides that when a person is accused of more offences than one of the same kind committed within twelve months he may be charged with and tried at one trial for any number of them not exceeding three. The second of these exceptions is contained in s. 165(1) which reads:

> 165(1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

[7] The third and fourth exception contained in s. 165 and s. 170, respectively, are not relevant for the present appeal.

[8] There is no dispute that the two alleged offences by the appellant are distinct offences. Two distinct charges were correctly preferred, as required by the law. However, the two charges were tried jointly in the same trial. Is the trial to be held illegal? In the trial of a criminal case, it is not permissible to resort to procedure not sanctioned by law and the provisions of the Criminal Procedure Code are exhaustive of the matters to which they relate.

[9] The law is that a joint trial may be held and not that it must be held. A court is never obliged to hold a joint trial. Even where it can hold a joint trial, it is open to the court to hold separate trials for the various offences.

[10] The issue in the present appeal before us is primarily whether the learned Judicial Commissioner was right in concluding that the two charges fell within s. 165(1) CPC. Whether a number of acts do or do not form the same transaction for the purposes of ss. 165 and 170 CPC is a question of fact to be decided upon the circumstances of each individual case.

[11] The first offence (the 1st charge) was alleged to have occurred in the month of October 1992 at approximately 12.30pm whereas the second offence (the 2nd charge) was alleged to have occurred between 1992 and 1995. On the face of the two charges the two offences could have occurred up to three years apart! There is clear absence of proximity of time between the two offences for continuity of action and purpose, to render the acts

A to have been done in one series so connected together as to form the same transaction. We are, therefore, of the view that this is obviously not a case in which the two charges can be tried together in one trial which is sanctioned by the law. The two charges do not fall within s. 165(1) CPC.The charges also do not
B fall within s. 164 CPC because the two alleged offences were not committed within the space of 12 months.

[12] In the above circumstances, the trial of the appellant on the charges on which he was tried was clearly forbidden by s. 163
C CPC, as it did not fall within the cases mentioned in ss. 164 and 165 CPC. The appellant ought to have been tried separately on the two charges, the failure of which has resulted in an illegality. The trial of the appellant in the Sessions Court is null and void.

D **[13]** We are unanimous that this appeal be allowed. The order of the High Court is set aside. The conviction and sentence on both the charges imposed by the Sessions Court is also set aside. We make no order for a re-trial in the circumstances of this case. The Public Prosecutor is at liberty to exercise his discretion to charge the appellant afresh.
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